IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 18, 2009 Session

STATE OF TENNESSEE v. GREGORY LAMOUR JUSTICE

Appeal from the Criminal Court for Davidson County
No. 2007-D-3028 Steve Dozier, Judge

No. M2008-02266-CCA-R3-CD - Filed March 10, 2010

Appellant, Gregory Lamour Justice, was convicted by a Davidson County Jury of facilitation of the sale of less than .5 grams of cocaine, possession of .5 grams or more of cocaine with the intent to sell or deliver, and possession of marijuana. After a sentencing hearing, Appellant was sentenced as a Range II, multiple offender to an effective sentence of fourteen years at thirty-five percent. On appeal, Appellant raises four issues for our review: (1) whether the State failed to establish chain of custody for the cocaine that was recovered from Appellant and a co-defendant; (2) whether the trial court abused its discretion by allowing the State to introduce a second set of test results from the Tennessee Bureau of Investigation ("TBI") when the report was introduced by the State as supplemental discovery; (3) whether the evidence was sufficient to sustain the convictions for facilitation and possession with the intent to sell or deliver; and (4) whether the trial court properly sentenced Appellant. After a thorough review of the record, we determine that chain of custody for the cocaine was properly established through the testimony at trial and that the trial court properly allowed the State to introduce the test results from the TBI. Further, we determine that the evidence was sufficient to support the convictions and that the trial court properly denied an alternative sentence. The judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and CAMILLE R. MCMULLEN, JJ., joined.

Manuel B. Russ, Nashville, Tennessee, for the appellant, Gregory Lamour Justice.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany Faughn, Assistant Attorney General; Victor S. Johnson, District Attorney General, and J. Wesley King, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Defendants, Marnita N. Roberson, and Quartez Willelee Dryden were indicted by the Davidson County Grand Jury on November 2, 2007. Appellant was indicted for the sale of less than .5 grams of cocaine, possession of more than .5 grams of cocaine with the intent to sell or deliver, possession of marijuana, and unlawful possession of a controlled substance. Defendants Roberson and Dryden were indicted for the sale of less than .5 grams of cocaine.

At trial, the State established that on July 20, 2007, Detective Tim Szymanski of the Narcotics Division of the Metropolitan Nashville Police Department was working in an undercover capacity. As part of the investigation, Detective Szymanski was "going to areas of town and attempting to purchase narcotics from street-level narcotics dealers." As part of the investigation, Detective Szymanski wore a wire and was followed closely by surveillance units and arrest teams while he tried to make drug buys.

Around 6:00 p.m. that evening, Detective Szymanski pulled his unmarked patrol car into a vacant lot located behind a liquor store on Eleventh Avenue near Jefferson Street, an area that Detective Szymanski described as a known drug area. The car was approached by Michael White, who asked Detective Szymanski what he needed. Detective Szymanski informed Mr. White that he was looking for twenty dollars worth of cocaine.

Mr. White told the detective that he could get the cocaine, so Detective Szymanski gave Mr. White a previously photocopied twenty dollar bill. Near that same time, Defendant Quartez Dryden walked up to the car and wanted to know if Detective Szymanski needed anything. Detective Szymanski told Defendant Dryden that he was already getting a "twenty" from Mr. White. Defendant Dryden insisted that Mr. White would not be able to get the cocaine. Defendant Dryden then offered to get the detective a "better quality and quantity of dope."

Defendant Dryden walked over to where Defendant Roberson was sitting, about twenty-five yards away. Defendant Roberson looked at the detective and "gave a head nod." Defendant Dryden walked back to the car and told the detective that she would not "let the dope go without the money." Detective Szymanski retrieved the twenty dollar bill from Mr. White and gave it to Defendant Dryden.

Defendant Dryden returned to the area where Defendants Roberson and Justice were sitting and the three formed a "huddle." Detective Szymanski could see all three people were "handing things off." He also saw "Dryden's hands come together with Roberson's and then [Appellant's] hands come together" with Defendant Dryden's. Detective Szymanski admitted that he could not see exactly what happened in the huddle. When Defendant Dryden returned to the car, he had a "cupped" hand and got into the car. In the car, Defendant Dryden held out his hand to reveal "twenty dollars worth of street-level crack cocaine." There was one large crack rock "with some crumbs around it" that appeared to have been broken off of a larger rock.

At that time, Detective Szymanski gave the "takedown" signal over his wire. Defendant Dryden cupped his hand again and threw the white rocks that were in his hand onto the ground. When the other officers arrived, the suspects were arrested. Detective Szymanski was able to recover the crack that had been thrown to the ground. At trial, the detective identified the evidence that was recovered from Defendant Dryden. The case number assigned to the evidence corresponded to the complaint number on the arrest report.

Detective Michael Donaldson, another member of the Narcotics Unit of the Metropolitan Nashville Police Department, was also working with Detective Szymanski on July 20, 2007. Detective Donaldson was stationed in a car in a vacant parking lot about fifty feet away from Detective Szymanski's car. He could hear the conversations over the wire. Detective Donaldson saw Mr. White approach the car and heard Detective Szymanski ask for a "twenty." Detective Donaldson also heard Defendant Dryden speaking to the detective. Defendant Dryden told Detective Szymanski that Mr. White was going to sell him "woo."[1]

Detective Donaldson confirmed that Defendant Dryden claimed that he could get the "dope" from his sister. Detective Donaldson saw Defendant Dryden approach Appellant and Defendant Roberson. There was no one "within fifteen to twenty feet" of them. Defendant Dryden returned to Detective Szymanski's car and told him that he needed the money. Detective Donaldson then saw Defendant Dryden return to the group in the lawn chairs, make a huddle, and return to Detective Szymanski's car.

At that time, Detective Donaldson heard the takedown signal. He ordered Appellant and Defendant Roberson to put their hands up. Detective Donaldson saw Appellant throw "a small plastic bag that was later recovered that had crack cocaine in it . . . over his left shoulder." The bag landed eight to ten inches away on the other side of the chainlink fence. When Detective Donaldson retrieved the bag, he noted that it contained one large crack rock and two small crack rocks. He estimated that it weighed about one gram and was worth

[1] "Woo" is a street term for fake drugs.

between sixty to eighty-five dollars. The bag and the crack were placed into a cellophane evidence bag.

Defendant Roberson's purse was searched incident to her arrest. There was no cocaine inside. When Appellant was searched, authorities retrieved a bag containing leafy, plant-like material from his pants pocket. The marijuana weighed about a gram and a half. The twenty dollar bill was recovered "on the ground, in between the two chairs" between Appellant and Defendant Roberson. The authorities also recovered a black box containing crack and a crack pipe from Mr. White. This evidence was kept separate from the evidence seized from Appellant.

Officer Issac Martinez, the Custodian of Property with the Metropolitan Nashville Police Department, testified that the evidence in the case herein was deposited in the drop-box in the property room on the same day as the arrests. The property was placed in a larger evidence bag the following Monday, July 23, 2007. It was sealed and placed in the safe. The bag contained, "two bags or rocks, a bag of plant material," a crack pipe, and "a black container, [t]hat's said to contain rocks. . . ."

On November 1, 2007, the evidence bag was delivered to the intake custodian of the TBI Crime Lab for testing. It was retrieved on December 18, 2007, and returned to the vault. The evidence bag was returned to the TBI on May 29, 2008, for additional testing. The bag was picked up on June 2, 2008. Officer Martinez checked to make sure that "everything was still intact."

Jacquelyn Poarch, a Forensic Technician in Evidence Receiving at the TBI Crime Lab received the evidence. The evidence was stored in a vault until it was analyzed. After being analyzed, the evidence was returned to the police department. The same procedure was followed the second time the evidence was analyzed.

Cassandra Franklin was the forensic chemist entrusted with evaluating the evidence received by the TBI. The bag thrown by Appellant contained one large crack rock and two smaller rocks. The material consisted of cocaine base and weighed one gram. The marijuana weighed 1.3 grams. After testing the items, Ms. Franklin returned them to the evidence vault, bagged, and sealed them.

When Ms. Franklin received the evidence for the second time in May, she analyzed the items that were recovered from Defendant Dryden. This evidence tested positive as cocaine base and weighed .06 grams. Ms. Franklin also analyzed the black box, which tested positive for cocaine that weighed .05 grams. As per procedure, after testing, the items were returned to the evidence bag and sealed.

At the conclusion of the jury trial, Appellant was convicted of facilitation of the sale of less than .5 grams of cocaine, a Class D felony, possession of more than .5 grams of cocaine with the intent to sell or deliver, and possession of marijuana.

The trial court held a separate sentencing hearing. At the hearing, the trial court sentenced Appellant as a Range II, multiple offender, to five years for facilitation of the sale of less than .5 grams of cocaine, fourteen years for possession of more than .5 grams of cocaine with the intent to sell or deliver, and three years for possession of marijuana. The sentences were ordered to be served concurrently, for a total effective sentence of fourteen years.

After the denial of a motion for new trial, Appellant appealed the judgments of the trial court. On appeal, Appellant argues that the trial court improperly admitted the cocaine into evidence when the State failed to prove the chain of custody and allowed the State to introduce a lab report from the TBI that he claims was not supplied to Appellant in accordance with Tennessee Rule of Criminal Procedure 16. Further, Appellant complains that the evidence was insufficient and that the trial court improperly denied an alternative sentence.

Analysis

Chain of Custody

Appellant first argues that the trial court abused its discretion when it allowed the State to admit the narcotics recovered from Appellant and Defendant Dryden into evidence. Specifically, Appellant argues that the items did not have the "necessary authenticity to be admitted into evidence" and that the chain of custody was not established. The State, on the other hand, argues that the trial court did not abuse its discretion and that there was sufficient proof to establish the chain of custody of the drugs.

As a condition precedent to the introduction of tangible evidence, a witness must be able to identify the evidence or establish an unbroken chain of custody. *State v. Goodman*, 643 S.W.2d 375, 381 (Tenn. Crim. App. 1982). The purpose of the chain of custody requirement is to "demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence." *State v. Braden*, 867 S.W.2d 750, 759 (Tenn. Crim. App. 1993). While the State is not required to establish facts which exclude every possibility of tampering, the circumstances established must reasonably assure the identity of the evidence and its integrity. *State v. Ferguson*, 741 S.W.2d 125, 127 (Tenn. Crim. App. 1987). This rule does not require absolute certainty of identification. *Ritter v. State*, 462 S.W.2d 247, 250 (Tenn. Crim. App. 1970). Absent sufficient proof of the chain of custody, however, the

"evidence should not be admitted . . . unless both identity and integrity can be demonstrated by other appropriate means." Neil P. Cohen et al., *Tennessee Law of Evidence* § 9.01[13][c] (4th ed. 2000). A leading treatise on evidence explains:

> The concept of a "chain" of custody recognizes that real evidence may be handled by more than one person between the time it is obtained and the time it is either introduced into evidence or subjected to scientific analysis. Obviously, any of these persons might have the opportunity to tamper with, confuse, misplace, damage, substitute, lose and replace, or otherwise alter the evidence or to observe another doing so. Each person who has custody or control of the evidence during this time is a "link" in the chain of custody. Generally, testimony from each link is needed to verify the authenticity of the evidence and to show that it is what it purports to be. Each link in the chain testifies about when, where, and how possession or control of the evidence was obtained; its condition upon receipt; where the item was kept; how it was safeguarded, if at all; any changes in its condition during possession; and when, where and how it left the witness's possession.

Id. The issue addresses itself to the sound discretion of the trial court; its determination will not be disturbed in the absence of a clearly mistaken exercise of such discretion. *State v. Beech*, 744 S.W.2d 585, 587 (Tenn. Crim. App. 1987); *State v. Johnson*, 673 S.W.2d 877, 881 (Tenn. Crim. App. 1984). "Reasonable assurance, rather than absolute assurance, is the prerequisite for admission." *State v. Kilpatrick*, 52 S.W.3d 81, 87 (Tenn. Crim. App. 2000).

In the case herein, counsel for Appellant objected to the introduction of the cocaine recovered from Defendant Dryden and Appellant. The trial court overruled the objection, determining that Detective Donaldson had "identified both the substance he says was thrown and the substance he was handed by Detective Szymanski." Further, the trial court noted that there was testimony from Detective Szymanski that "the smaller rock was taken by Detective Szymanski, given to Detective Donaldson, [and] placed in a drop safe over the weekend." The intake officer did not testify, but Officer Martinez testified regarding this link in the chain by naming Officer Smith as the officer who received the evidence. Officer Martinez described the actions undertaken at the police department after intake, which consisted of placing the evidence in the vault until it was taken to the TBI lab. As far as the "other, larger substance" that was thrown by Appellant, Detective Donaldson identified the substance and testified that he placed it in the drop box. His testimony was confirmed by Officer Martinez. The trial court reviewed all the evidence and determined that there was "not . . . a showing of tampering, loss, substitution or mistake" and was convinced "that the identity and integrity of the items" was maintained throughout the proceedings.

After a review of the evidence, we determine that the trial court did not abuse its discretion in admitting the evidence. The evidence offered sufficient proof of the chain of custody of the evidence. In other words, the testimony at trial served to "reasonably assure the identity of the evidence and its integrity." *See Ferguson*, 741 S.W.2d at 127. Appellant is not entitled to relief on this issue.

Supplemental Discovery

Next, Appellant argues that the trial court erred when it allowed the State to "admit evidence that was not produced during discovery in a manner that complied with Rule 16 of the Tennessee Rules of Criminal Procedure." Specifically, Appellant argues that the TBI's second report regarding the analysis of the drugs was submitted as supplemental discovery two days prior to trial and contained misleading information. Appellant insists that these actions by the State prejudiced the defense. The State counters that the report was properly submitted as supplemental discovery.

Tennessee Rule of Criminal Procedure 16(a)(1)(G) provides that the State is to disclose the following evidence:

> Reports of Examinations and Tests. Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph the results or reports of physical or mental examinations, and of scientific tests or experiments if:
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> (i) the item is within the state's possession, custody, or control;
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> (ii) the district attorney general knows--or through due diligence could know--that the item exists; and
>
> (iii) the item is material to preparing the defense or the state intends to use the item in its case-in-chief at trial.

If a party fails to comply with a discovery request, "the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances." Tenn. R. Crim. P. 16(d)(2)(A)-(D). Whether a defendant has been prejudiced by the State's failure to disclose information is a significant factor in determining an appropriate remedy. *State v. Smith*, 926 S.W.2d 267, 270 (Tenn. Crim. App. 1995). When arguing that the State violated Rule 16, the defendant bears the burden of showing "the degree to which the impediments to discovery hindered trial preparation and defense at trial." *State v. Brown*, 836 S.W.2d 530, 548 (Tenn. 1992). However, evidence should only be

excluded when it is shown that the party is actually prejudiced by the failure to comply with discovery and the prejudice cannot otherwise be eliminated. *State v. Caughron*, 855 S.W.2d 526, 539 (Tenn. 1993); *State v. James*, 688 S.W.2d 463, 466 (Tenn. Crim. App. 1984).

Prior to trial, Appellant asked the trial court to exclude any evidence that was not disclosed prior to trial. Specifically, Appellant argued, as he does on appeal, that a second test of the evidence conducted by the TBI on May 29, 2008, should be excluded because the supplemental report was not supplied to Appellant by the State until the weekend prior to trial. In response, the State explained that the report was conducted after they learned that the TBI was only testing a "portion of the drugs submitted" in cases. The second test was conducted on the bag of drugs recovered from Defendant Dryden and the black box recovered from Mr. White. The tests revealed the items seized were "positive for cocaine."

After hearing Appellant's argument for exclusion of the evidence, the trial court determined that Appellant had failed to show prejudice as a result of the failure of the State to provide the evidence to Appellant sooner. The State had indicated to Appellant, through discovery, that physical evidence had been submitted to the TBI lab. This list of evidence included both of the items that were tested in the second test. Further, the trial court determined and Appellant agreed that Appellant was already on notice that the State was alleging that the items contained cocaine. Appellant complained that he was not aware from the report what was tested and that he was unable to speak to the technician about what was tested the second time. The trial court assured Appellant that an opportunity to interview the technician would occur prior to the introduction of testimony.

For the first time on appeal, Appellant argues that the report was confusing in that the TBI "mislabel[ed] the total weight" in the first report and that this did not become apparent until cross-examination." Appellant has waived this issue for appellate review because he failed to raise it at trial. *See* Tenn. R. App. P. 36(a) (providing that "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

We conclude that the trial court did not abuse its discretion. The record reveals that the State promptly turned over the second set of lab results as supplemental discovery in compliance with Rule 16. Further, previous discovery revealed that the State had already submitted these items to the lab. Moreover, the trial court agreed to let Appellant question the technician prior to the introduction of testimony at trial. Appellant is not entitled to relief on this issue.

Sufficiency of the Evidence

Appellant argues that the evidence was insufficient to sustain the convictions for facilitation and possession with intent to sell. Specifically, Appellant argues that he was never in possession of the narcotics and lacked the culpable mental state to be convicted of the charges. Appellant does not challenge the sufficiency of the evidence with regard to his conviction for possession of marijuana. The State disagrees, arguing that the evidence is sufficient to support the convictions.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions of witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trier of fact. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Of course, a criminal offense may be established exclusively by circumstantial evidence. *State v. Tharpe*, 726 S.W.2d 896, 900 (Tenn. 1987); *State v. Jones*, 901 S.W.2d 393, 396 (Tenn. Crim. App. 1995). However, the trier of fact must be able to "determine from the proof that all other reasonable theories except that of guilt are excluded . . . ." *Jones*, 901 S.W.2d at 396; *see also, e.g., Tharpe*, 726 S.W.2d at 900.

Appellant was found guilty of violating Tennessee Code Annotated section 39-17-417(a)(4), which makes it a crime to knowingly "possess a controlled substance with intent to manufacture, deliver or sell the controlled substance." A violation of Tennessee Code Annotated section 39-17-417(a)(4) is a class B felony if the amount of the cocaine

possessed is more than .5 grams. T.C.A. § 39-17-417(c)(1). Thus, in order to convict Appellant, the State was required to show: (1) a knowing mental state; (2) possession of cocaine; (3) an intent to sell or deliver that cocaine; and (4) that the weight of the cocaine was .5 grams or more. *See* T.C.A. § 39-17-417(a). The State unquestionably proved beyond a reasonable doubt that the substance found in the bag was cocaine and that the weight of the cocaine was one gram. Thus, the question is whether Appellant knowingly possessed the cocaine with the intent to sell or deliver it.

"[A] person . . . acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist." T.C.A. § 39-11-302(b). A conviction for possession of cocaine may be based upon either actual or constructive possession. *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001); *State v. Brown*, 823 S.W.2d 576, 579 (Tenn. Crim. App. 1991); *State v. Cooper*, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987). Before a person can be found to constructively possess a drug, it must appear that the person has the power and intention at any given time to exercise dominion and control over the drugs either directly or through others. *State v. Patterson*, 966 S.W.2d 435, 445 (Tenn. Crim. App. 1997); *State v. Williams*, 623 S.W.2d 121, 125 (Tenn. Crim. App. 1981). The mere presence of a person in an area where drugs are discovered is not, alone, sufficient to support a finding that the person possessed the drugs. *Cooper*, 736 S.W.2d at 129. However, as stated above, circumstantial evidence alone may be sufficient to support a conviction. *Tharpe*, 726 S.W.2d at 899-900; *State v. Gregory*, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993). The circumstantial evidence must be not only consistent with the guilt of the accused, but it must also be inconsistent with innocence and must exclude every other reasonable theory or hypothesis except that of guilt. *Tharpe*, 726 S.W.2d at 900. In addition, "'it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that [the defendant] is the one who committed the crime.'" *Id.* (quoting *Pruitt v. State*, 460 S.W.2d 385, 390 (Tenn. Crim. App. 1970)). Further, the trier of fact may infer from the amount of the drugs, along with relevant facts surrounding the arrest, that the drugs were possessed for the purpose of selling them. T.C.A. § 39-17-419; *see also State v. Willie Earl Kyles, Jr.*, No. W2001-01931-CCA-R3-CD, 2002 WL 927604, at *2 (Tenn. Crim. App., at Jackson, May 3, 2002), *perm. app. denied*, (Tenn. Oct. 21, 2002) (concluding that jury could infer possession of drugs with intent to sell or deliver from amount of drugs and circumstances surrounding arrest of defendant); *State v. James R. Huntington*, No. 02C01-9407-CR-00149, 1995 WL 134589, at *3-4 (Tenn. Crim. App., at Jackson, Mar. 29, 1995), *perm. app. denied*, (Tenn. Jul. 10, 1995) (determining that jury could infer intent to sell marijuana primarily from large quantity of marijuana in defendant's possession).

Appellant was also convicted of a facilitation of a violation of Tennessee Code Annotated section 39-17-417(a)(3), which makes it an offense for a defendant to knowingly

sell a controlled substance. A violation of section 39-17-417(a) with respect to cocaine in an amount less than .5 grams is a Class C felony. T.C.A. § 39-17-417(c)(2)(A). Facilitation of possession of a controlled substance with the intent to sell or deliver has been acknowledged as a lesser included offense of possession with intent to sell or deliver. *See State v. Nash*, 104 S.W.3d 495, 499 (Tenn. 2003). Facilitation is defined as follows:

> A person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2) the person knowingly furnishes substantial assistance in the commission of the felony.
>
> Criminal responsibility, under Tennessee Code Annotated section 39-11-402(2), is:
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> Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids or attempts to aid another person to commit the offense.

T.C.A. 39-17-417(a)(3).

Viewing the evidence in a light most favorable to the State, the proof at trial established that Defendant Dryden informed Detective Szymanski that he could procure the drugs. Defendant Dryden approached Appellant and Defendant Roberson and had a short conversation with them before returning to the detective to get the money for the drugs. Defendant Dryden returned to the location where Appellant and Defendant Roberson were sitting and the three were in huddle, "handing things off." Hands could be seen coming together before Defendant Dryden returned to the car. When he returned to the car, he had the cocaine cupped in the palm of his hand. The twenty dollar bill provided by Detective Szymanski was found on the ground between Appellant and Defendant Roberson after police were called in to arrest the suspects. Further, Appellant was seen by Detective Donaldson throwing a plastic bag over the fence that was later determined to contain a large crack rock and several smaller rocks. Detective Szymanski testified that the cocaine Defendant Dryden delivered appeared to have been broken off from a larger rock. The cocaine in Appellant's possession weighed one gram. The cocaine was worth about sixty to eighty-five dollars. Appellant did not have any drug paraphernalia on his person, which would have suggested that the cocaine was for his own personal use. We conclude that a rational jury could conclude that Appellant was guilty of facilitation of the sale of less than .5 grams of cocaine and that he possessed more than .5 grams of cocaine with the intent to sell or deliver. Appellant is not entitled to relief on this issue.

Sentencing

Lastly, Appellant complains about his sentence. Specifically, Appellant argues that the trial court erred by ordering him to serve his sentence in confinement. Appellant suggests that the trial court should have ordered him to serve a sentence in community corrections. Appellant complains that the trial court used Appellant's role as a leader in the commission of the offense and the fact that he was on parole at the time of the commission of the offense to determine that his sentence needed enhancement and made him a poor candidate for rehabilitation. The State, on the other hand, contends that Appellant was not even eligible for an alternative sentence involving community corrections and that the trial court properly sentenced Appellant to an effective fourteen-year sentence.

When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "[T]he presumption of correctness 'is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.'" *State v. Carter*, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991)). "If . . . the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails." *Id.* at 345 (citing *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992)). We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, first determines the range of sentence and then determines the specific sentence and the appropriate combination of sentencing alternatives by considering: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts regarding sentences for similar offenses, (7) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (8) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b),-103(5); *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

When imposing the sentence within the appropriate sentencing range for the defendant:

> [T]he court shall consider, but is not bound by, the following *advisory* sentencing guidelines:
>
> (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
>
> (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

T.C.A. § 40-35-210(C) (emphasis added). However, the weight given by the trial court to the mitigating and enhancement factors are left to the trial court's discretion and are not a basis for reversal by an appellate court of an imposed sentence. *Carter*, 254 S.W.3d at 345. "An appellate court is . . . bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." *Id.* at 346.

With regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

> In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration. . . .

A defendant who does not fall within this class of offenders "and who is an especially mitigated offender or standard offender convicted of a Class C, D, or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. However, defendants who are classified as Range II or Range III offenders are generally not to be considered as favorable candidates for alternative sentencing. T.C.A. § 40-35-102(6). A court shall consider, but is not bound by, this advisory sentencing guideline." T.C.A. § 40-35-102(6); *see also Carter*, 254 S.W.3d at 347.

Furthermore, with regard to probation, a defendant whose sentence is ten years or less is eligible for probation. T.C.A. § 40-35-303(a).

However, all offenders who meet the criteria for alternative sentencing are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing *State v. Moss*, 727 S.W.2d 229, 235 (Tenn. 1986)). Even if a defendant is a favorable candidate for alternative sentencing under Tennessee Code Annotated section 40-35-102(6), a trial court may deny an alternative sentence because:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

T.C.A. § 40-35-103(1)(A)(-C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated section 40-35-103(5), which states, in pertinent part, "[t]he potential or lack of potential for the rehabilitation or treatment of a defendant should be considered in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant's untruthfulness and lack of candor as they relate to the potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v. Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *Dowdy*, 894 S.W.2d at 305-06.

Appellant herein was convicted of facilitation of the sale of less than .5 grams of cocaine, a Class D felony, possession with intent to sell or deliver .5 grams or more of cocaine, a Class B felony, and possession of marijuana, a Class E felony. Appellant was a Range II offender and, thus, not considered a favorable candidate for alternative sentencing. T.C.A. § 40-35-102(6). Moreover, Appellant's sentence of fourteen years rendered him ineligible for probation. T.C.A. § 40-35-303(a). Appellant sought an alternative sentence of a placement in a community corrections program.

Tennessee Code Annotated section 40-36-106 provides, in pertinent part:

> (a)(1) An offender who meets all of the following minimum criteria shall be considered eligible for punishment in the community under the provisions of this chapter:
>
> (A) Persons who, without this option, would be incarcerated in a correctional institution;
>
> (B) Persons who are convicted of property-related, or drug- or alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;
>
> (C) Persons who are convicted of nonviolent felony offenses;
>
> (D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
>
> (E) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
>
> (F) Persons who do not demonstrate a pattern of committing violent offenses;
> . . . .

In sentencing Appellant, the trial court noted that Appellant was incarcerated on other charges at the time of his sentencing. As such, he was not eligible for routine placement on community corrections under Tennessee Code Annotated section 40-36-106(a). Further, Appellant is not eligible for the special needs provision of the statute because he is not eligible for probation. The trial court applied two enhancement factors, finding that Appellant was a leader in the commission of the offense and that Appellant was on parole at the time of the offense. Appellant has an extensive criminal history comprising of at least twenty-nine prior convictions, many involving drugs. At the time of the offenses herein, he was on parole for two convictions for the sale of cocaine. Obviously, past attempts at rehabilitation have failed. The trial court properly denied an alternative sentence. Appellant is not entitled to relief on this issue.

Conclusion

For the foregoing reasons, the judgments of the trial court are affirmed.

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JERRY L. SMITH, JUDGE